RECORD AND BRIEFS

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Nos. 16-74, 16-86, 16-258

In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, *ET AL.*,
Petitioners,

v.

MARIA STAPLETON, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Third, Seventh, and Ninth Circuits

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; ACLU OF ILLINOIS; ACLU OF NORTHERN CALIFORNIA FOUNDATION, INC.; ACLU OF NEW JERSEY; AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Petitioners,

v.

STARLA ROLLINS,

Respondent.

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Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. *Amos*,
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Found. of Human Understanding v. *United States*,
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Holt v. *Hobbs*,
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Hosanna-Tabor Evangelical Lutheran Church & Sch. v. *E.E.O.C.*,
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TABLE OF AUTHORITIES—continued

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498 U.S. 133 (1990) 22

Larson v. *Valente*,
456 U.S. 228 (1982) 30, 31

Living Faith, Inc. v. *Comm'r*,
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Locke v. *Davey*,
540 U.S. 712 (2004) 7

Lutheran Soc. Serv. of Minn. v. *United States*,
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March for Life v. *Burwell*,
128 F. Supp. 3d 116 (D.D.C. 2015) 32, 33

Mass. Mut. Life Ins. Co. v. *Russell*,
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Nachman Corp. v. *Pension Benefit Guar. Corp.*,
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Real Alts., Inc. v. *Burwell*,
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Sherbert v. *Verner*,
374 U.S. 398 (1963) 3, 12

Spiritual Outreach Soc'y v. *Comm'r*,
927 F.2d 335 (8th Cir. 1991) 27, 28

Texas Monthly, Inc. v. *Bullock*,
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Tony & Susan Alamo Found. v. *Sec'y of Lab.*,
471 U.S. 290 (1985) 17, 18

Torcaso v. *Watkins*,
367 U.S. 488 (1961) 6

TABLE OF AUTHORITIES—continued

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United States v. *Lee*, 455 U.S. 252 (1982) 12

Williams Home, Inc. v. *United States*, 540 F. Supp. 310 (W.D. Va. 1982) 28

CONSTITUTION, STATUTES, AND REGULATIONS

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26 U.S.C. § 508 30

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26 U.S.C. § 7611 30

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42 U.S.C. § 2000e-2 ..... 12, 14
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MISCELLANEOUS

American Civil Liberties Union, *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threats To Women's Health and Lives* (May 2016), http://tinyurl.com/ACLUSpeakOut 23

American Civil Liberties Union & MergerWatch, *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Reproductive Health Care* (Dec. 2013), http://tinyurl.com/MisOfMed 24

Board of Directors, Advocate Health Care, https://tinyurl.com/AdvHCBdD 23

Board of Directors, Dignity Health, https://tinyurl.com/DignityHBd 23

Board of Trustees, St. Peter's Hospital, http://www.sphcs.org/BoardofTrustees 23

TABLE OF AUTHORITIES—continued

Page(s)

Zvi Bodie & Robert C. Merton, *Pension Benefit Guarantees in the United States: A Functional Analysis, in The Future of Pensions in the United States* (Ray Schmitt ed., 1993) 16

Brief of Americans United for Separation of Church and State and American Civil Liberties Union as *Amici Curiae* in Support of Petitioners, *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2945402 ..... 2, 3

Brief of Americans United for Separation of Church and State as *Amicus Curiae* in Support of Petitioner, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2361896 2

Brief of Baptist Joint Committee for Religious Liberty as *Amicus Curiae* in Support of Respondents, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 692850 33

Brief of Former Corrections Officials as *Amici Curiae* in Support of Petitioner, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2361906 2

Robert L. Clark & Ann A. McDermed, *Pension Wealth and Job Changes: The Effects of Vesting, Portability and Lump-Sum Distributions*, 28 Gerontologist 524 (1988) 19

TABLE OF AUTHORITIES—continued

Page(s)

Dignity Health and Subordinate Corporations, *Consolidated Financial Statements as of and for the Years Ended June 30, 2015 and 2014 and Independent Auditors' Report* (Sept. 22, 2015), http://tinyurl.com/DHFinRep 8

Molly Gamble, *25 Largest Non-Profit Hospital Systems*, Becker's Hosp. Rev. (July 24, 2012), http://tinyurl.com/nonprofithospitals 23

Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press (Oct. 5, 2013), https://tinyurl.com/unprotectedpensionAP 17

In Reversal, PBGC Covers Pension of Hospital Center at Orange, Pension Benefit Guaranty Corporation (May 10, 2013), http://tinyurl.com/pbgcrelease 21

Richard A. Ippolito, PENSION PLANS AND EMPLOYEE PERFORMANCE: EVIDENCE, ANALYSIS, AND POLICY (1997) 9

IRS, *Form 990*, https://tinyurl.com/IRSFrm990 29

IRS Pub. 1828 30

Laurence J. Kotlikoff & David A. Wise, THE WAGE CARROT AND THE PENSION STICK: RETIREMENT BENEFITS AND LABOR FORCE PARTICIPATION (1989) 19

TABLE OF AUTHORITIES—continued

Page(s)

Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic May Lose Their Pensions in Sale*, NorthJersey.com (Apr. 26, 2013), http://tinyurl.com/stmaryshospital 17, 18, 21

MergerWatch, *No Strings Attached: Public Funding of Religiously-Sponsored Hospitals in the United States* (2002), https://tinyurl.com/zygxped 24

MergerWatch, *When Hospitals Merge: Updating State Oversight to Protect Access to Care* (2016), https://tinyurl.com/HospMerge16 24

S. Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965 ..... 7, 33

Workers Covered by Church Plans Tell Their Stories, Pension Rights Center, http://tinyurl.com/hospitalcenter 16, 17, 21

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; ACLU OF ILLINOIS; ACLU OF NORTHERN CALIFORNIA FOUNDATION, INC.; ACLU OF NEW JERSEY; AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that was founded in 1947 and today has more than 120,000 members and supporters nationwide. Americans United's mission is to advance the free-exercise rights of individuals and religious communities to worship as they see fit and to preserve the separation of church and state as a vital component of democratic government. Consistent with the constitutionally guaranteed separation of church and state, Americans United opposes religious exemptions that would harm innocent third parties.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan public-interest organization of more than one million members dedicated to defending the civil liberties guaranteed by the Constitution and the nation's civil-rights laws. The ACLU of Northern California Foundation, Inc., the ACLU of New Jersey, and the ACLU of Illinois are affiliates of the national ACLU. The ACLU has a

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

long history of defending the fundamental right to religious liberty, and routinely brings cases designed to protect the right to religious exercise and expression. At the same time, the ACLU is deeply committed to safeguarding the rights of employees to be free from discrimination and other deprivations.

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principles that both the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution work to protect religious liberty for all Americans, that it is appropriate under the First Amendment for government to grant religious accommodations that do not harm third parties, and that it violates the Establishment Clause to grant religious accommodations that clearly harm the interests of third parties.

Amici have long supported legal exemptions that reasonably accommodate religious practice. See, *e.g.*, Brief of Americans United for Separation of Church and State as *Amicus Curiae* in Support of Petitioner, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2361896 (supporting religious exemption from prison grooming regulations); Brief of Former Corrections Officials as *Amici Curiae* in Support of Petitioner, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2361906 (ACLU brief, same); Brief of Americans United for Separation of Church

and State and American Civil Liberties Union as *Amici Curiae* in Support of Petitioners, *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2945402 (proposing factors for test of religious accommodations). But those accommodations must respect the religious freedom of all persons and must not harm nonbeneficiaries. Petitioners' requests for exemptions from ERISA cannot be squared with these rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment forbid intrusive regulation of houses of worship as well as official promotion or favoritism toward religion. See *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963). Congress has provided a straightforward and carefully crafted statutory exemption from the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461, to serve the first prohibition. Petitioners attempt to stretch that exemption well beyond what Congress intended, thus converting it into an equally straightforward violation of the second.

ERISA exists "to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) (internal quotation marks and citations omitted). To that end, Congress enacted legal standards for employee pension plans, including minimum-funding requirements (29 U.S.C. § 1082), vesting requirements (29 U.S.C. § 1053(a)), plan-insurance requirements (29 U.S.C. § 1307), and required financial disclosures to plan participants and beneficiaries (29 U.S.C. §§ 1021–1025).

Concerned, however, that rigorous governmental regulation and oversight of church finances would violate the Religion Clauses, Congress included in ERISA an exemption for employee-benefit plans established by houses of worship. And recognizing that smaller, congregation-based churches tend to rely on pension boards or other outside organizations to administer their plans rather than operating the plans internally, Congress amended the church-plan exemption to cover plans established by houses of worship but maintained by those nonchurch entities.

Petitioners seek to shoehorn themselves into the church-plan exemption. But they are not churches. They are hospitals, with varying degrees of religious affiliation. The pension plans that they provide do not comply with ERISA—meaning that petitioners' 95,000 doctors, nurses, clerical workers, janitors, and others employees do not receive ERISA's protections. On its face, the church-plan exemption does not apply to petitioners; they are bound by, and concede that they do not meet, ERISA's requirements. That should end the matter.

Allowing hospitals and other religiously affiliated organizations that are not houses of worship to arrogate to themselves the legal status of a church, and thereby to deprive their legions of employees of ERISA's protections, would be impermissible religious favoritism, giving the institutions a leg up in the competitive marketplace based solely on religion. And because religiously affiliated hospitals continue to expand aggressively by purchasing other hospitals, this official favoritism would have widespread and detrimental effects on nonreligious community hospitals. At the same time, it would empower employers to oppress and impose massive harm on

working people that ERISA was enacted to prevent. The Establishment Clause forbids these results.

Petitioners contend, however, that the church-plan exemption should be extended to them not because they are churches, but because they are religious; to do otherwise, in their view, would entail unconstitutional governmental inquiry into what is and what is not a church.

But a host of long-standing state and federal laws and regulations provide church exemptions and accommodations; government officials apply those exemptions without difficulty every day; and the courts are more than capable of reviewing decisions about what counts as a church and what does not, without constitutional infirmity.

Extending the church-plan exemption to religiously affiliated entities, as petitioners ask, would transmogrify the exemption from the bar on intrusive governmental interference in church finances that Congress intended, into a naked statutory preference for religion that harms third parties. The Establishment Clause forbids that result. The consistent rulings of the courts of appeals should be affirmed.

ARGUMENT

Any review of a religiously based exemption from a generally applicable law must "separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment). ERISA's church-plan exemption was

carefully crafted to stay on the right side of that constitutional line by preventing intrusion into church finances.

Petitioners seek to stretch the exemption well beyond protection of houses of worship and their core ecclesiastical functions, and to apply it to situations in which the rationale for noninterference in internal church financial arrangements simply has no bearing. But the Establishment Clause mandates both that government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers" (*Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961)), and that religious accommodations are impermissible if they would harm nonbeneficiaries (see, *e.g.*, *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 705–08 (1985)). Treating hospitals and other religiously affiliated employers as though they were churches under ERISA would transgress both limitations.

I. Expanding The Church-Plan Exemption Would Violate The Establishment Clause.

A. Extending the church-plan exemption to religiously affiliated institutions would create an impermissible preference for religion.

A "principle at the heart of the Establishment Clause [is] that government should not prefer . . . religion to irreligion." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 703 (1994). Hence, the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso*, 367 U.S. at 495. Expanding the church-plan exemption would do precisely that—with far-reaching consequences.

1. Although government may in some circumstances provide religious accommodations that are not required by the Free Exercise Clause (see *Locke* v. *Davey*, 540 U.S. 712, 718–19 (2004)), those exemptions are cabined by the Establishment Clause's prohibition against favoring religion. Notably, houses of worship are treated with "special solicitude" under the First Amendment when it comes to their core ecclesiastical functions, such as choosing their ministers. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 189 (2012). ERISA's drafters understood that same rationale to require the government to stay out of churches' internal financial arrangements; they considered "examinations of [church] books and records" to be "an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities."[2] S. Rep. No. 93-383, at 81 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965.

2. Allowing petitioners to avail themselves of the church-plan exemption would not only be inconsistent with congressional intent and the plain language of the statute, for the reasons that respondents explain in detail (Resp. Br. 17–50), but also would be irreconcilable with the fundamental constitutional concerns that the exemption was designed to serve.

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[2] Because petitioners are hospitals and not houses of worship, *amici* do not address whether or under what circumstances the First Amendment may require, permit, or forbid church exemptions, statutory or otherwise. The issues presented by this case are whether religiously affiliated entities are the legal equivalent of churches (they aren't) and whether courts are capable of differentiating between the two (they are).

After all, respondents are hospitals, not houses of worship. Governmental oversight of their operations is a commonplace: Hospitals are subject to substantial federal and state regulation (see NELA *Amicus* Br. 25–28), including rigorous financial-oversight requirements that come with being recipients of billions of dollars of government funds from Medicare and Medicaid payments (see J.A. 258, 429, 778) and grants (see, *e.g.*, Dignity Health and Subordinate Corporations, *Consolidated Financial Statements as of and for the Years Ended June 30, 2015 and 2014 and Independent Auditors' Report* 16, 44 (Sept. 22, 2015), http://tinyurl.com/DHFinRep). Nothing about that financial regulation of healthcare facilities in any way implicates constitutional concerns about undue governmental interference in internal church operations or performance of core church functions. Neither does enforcement of ERISA.

3. Judicially extending the church-plan exemption to petitioners would thus be nothing more than a naked preference for religion: It would afford huge benefits to hospitals and other institutions if (and because) they are religiously affiliated—benefits unavailable to similarly situated secular institutions. The result would be a two-tiered system of nonprofit organizations: Community hospitals and other secular nonprofits would have to comply with ERISA, while religiously affiliated nonprofits, no matter what their function or how tenuous their connection to a house of worship, would be given a free pass. That preference cannot be squared with this Court's settled jurisprudence.

In *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), for example, the Court held that the Establishment Clause prohibited a state from exempting

religious periodicals from its sales tax because the exemption "direct[ed] a subsidy exclusively to religious organizations that [was] not required by the Free Exercise Clause and that either burden[ed] nonbeneficiaries markedly or [could not] reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15. Similarly, in *Caldor*, *supra*, the Court struck down a statute that guaranteed employees the day off on the Sabbath day of their choosing. 472 U.S. at 709–10. Because the statute allowed "Sabbath religious concerns automatically [to] control over all secular interests at the workplace[,] the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. It therefore "impermissibly advance[d] a particular religious practice" and could not stand. *Id.* at 710.

The same is true here: Whatever special solicitude may be owed to houses of worship in the conduct of their core ecclesiastical functions, it does not justify subsidizing religious hospitals over community hospitals.

4. Here, the subsidies would be substantial. Pension benefits are deferred compensation: Employees accept smaller paychecks upfront, knowing that they will receive alternative compensation in the form of a funded pension—a sort of forced-savings plan to provide them with greater security in retirement. See Richard A. Ippolito, PENSION PLANS AND EMPLOYEE PERFORMANCE: EVIDENCE, ANALYSIS, AND POLICY 10 (1997). But when, for example, a religiously affiliated hospital network acquires a hospital that has been subject to ERISA—as is ever more common and has in fact occurred here (see, *e.g.*, J.A. 735 (Dignity

Health's requests for church-plan status for two acquired hospitals))—the hospital network would then become free, if petitioners had their way, not just to stop funding employees' pensions, but also to drain the pension accounts (see Section I.B.2.a, *infra*).

The upshot would be that the religiously affiliated hospital would pocket money formerly reserved to employees, effectively paying the employees less—and retroactively so. And because, as explained more fully below, ERISA's disclosure requirements would not apply, the hospital would not even have to inform the employees that their pensions were being emptied. Community hospitals, meanwhile, would be at a distinct disadvantage: They could operate with a smaller bottom line than their legally favored religious counterparts, or they could reduce their employees' base salaries or cease offering pension plans altogether—rendering themselves less able to compete for high-quality medical personnel—because compliance with ERISA would be comparitively too costly. Petitioners ask this Court to reinterpret ERISA to require these undesirable, unintended, and ultimately unconstitutional results.

* * *

Petitioners seek to stand the constitutional prohibition against religious preferences on its head: Eschewing the requirement that religion and nonreligion must be treated equally, they contend that this Court is required to rewrite ERISA to grant them preferential treatment over other hospitals merely because they claim religious affiliations. Far from being constitutionally required, the First Amendment flatly forbids that result.

B. Extending the church-plan exemption would unconstitutionally harm employees.

If petitioners' pension plans were categorized as church plans, the companies would have license to continue inflicting immense economic harms on more than 95,000 current employees—and even more retirees, who already depend on their pensions to meet monthly expenses—by stripping them of the protections for their retirement savings that ERISA was designed to safeguard.

First, petitioners could continue to underfund the pension plans for their employees, leaving the employees at grave risk of losing even vested pension benefits. Second, petitioners could deny the employees the protection of federal pension insurance—an especially dangerous condition when combined with underfunding of the plans. Third, petitioners could delay indefinitely the vesting of pension benefits, depriving employees of job mobility—or simply clawing back the entirety of the employees' retirement savings if they do change jobs. Fourth, petitioners could withhold critical information about the financial state of the plans and the benefits available to the employees, denying the employees information essential to retirement planning. Allowing petitioners to inflict any of these harms on employees would raise serious Establishment Clause concerns. Collectively, the violations are unmistakable.

1. The Establishment Clause prohibits religious accommodations that harm third parties.

This Court has long recognized that religious accommodations not required by the Free Exercise

Clause must not come at the expense of third parties, for if they do, they run afoul of the Establishment Clause. Yet that would be the precise result here if petitioners' arguments were accepted.

As Justice Kennedy explained in *Grumet*, "a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment." 512 U.S. at 722 (Kennedy, J., concurring).

Thus, the Court invalidated a statute in *Caldor* that gave employees an unqualified right to take time off on the Sabbath day of their choosing. 472 U.S. at 705–08. The statute violated the Establishment Clause, the Court held, because it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 710. In *United States* v. *Lee*, 455 U.S. 252 (1982), the Court rejected an employer's request for a religious exemption from paying social-security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." *Id.* at 261. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80 (1977), the Court held that Title VII's reasonable-accommodation requirement did not authorize a religious exemption for an employee when affording the exemption would have imposed costs and burdens on his employer and fellow employees. And in *Sherbert*, the Court granted an exemption from regulations governing unemployment compensation only after confirming that the accommodation did not "abridge any other person's religious liberties." 374 U.S. at 409.

The Court reiterated the no-harm-to-third-parties principle in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), when it considered an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5. The Court held that the Act complied with the Establishment Clause only because, in applying it, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter*, 544 U.S. at 720 (citing *Caldor*, 472 U.S. 703); see also *Holt* v. *Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., joined by Sotomayor, J., concurring) (religious accommodation permissible because it "would not detrimentally affect others who do not share petitioner's belief").

The Court acknowledged the rule yet again in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In holding that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, afforded certain closely held companies a religious accommodation from the Affordable Care Act's requirement that employer-provided health plans include coverage for contraception, the Court concluded that the accommodation was permissible because there was an alternative method of ensuring that employees received the statutorily guaranteed coverage, and that "[t]he effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero" because "these women would still be entitled to all FDA-approved contraceptives without cost sharing." 134 S. Ct. at 2760. Justice Kennedy further underscored that an accommodation of religious exercise must not "unduly restrict other persons, such as employees, in protecting their own interests." *Id.* at 2786–87 (Kennedy, J., concurring).

The sole exception in this Court's jurisprudence to the constitutional bar against accommodations that harm third-parties arises when a law implicates core theological interests in employment of clergy or internal ecclesiastical governance. See *Hosanna-Tabor*, 565 U.S. at 181 (Free Exercise Clause's ministerial exception applied to antidiscrimination laws with respect to hiring and firing of ministers); *Amos*, 483 U.S. at 339 (exemption from some of Title VII's prohibitions did not violate Establishment Clause because selection of employees was part of "defin[ing] and carry[ing] out [organization's] religious mission[]").[3] As written, ERISA's church-plan exemption already fully addresses any valid concerns of this

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[3] Petitioners and their *amici* rely on a footnote in *Amos* to argue that religious accommodations that would result in harm to third parties are permissible as long as a religious institution rather than the government is the entity that is most directly responsible for inflicting that harm. See, *e.g.*, Pet. Br. 61. The remark, which Justice O'Connor deemed to be of "little significance" (*id.* at 347 (O'Connor, J., concurring in the judgment)), spoke to the church's decision in *Amos* to require employees to conform to its religious practices; the Court did not address the availability to nonchurches of a church exemption so that they could impose on employees substantial financial hardships that have nothing whatever to do with the employer's or the employees' faiths or religious practices. What is more, since *Amos* this Court has neither elaborated on nor followed the footnoted point—and for good reason: What mattered in *Amos*—what actually drove the Court's opinion—was that "Congress ha[d] chosen a rational classification to further a legitimate end," namely, to "alleviat[e] significant governmental interference with the ability of religious organizations to define and carry out their religious missions" by hiring coreligionists. *Id.* at 339. That reasoning has no bearing when the question is whether hospitals may deprive their employees of federally guaranteed rights to retirement security for no reason other than to line their own pockets.

sort that may arise. The rationale of avoiding undue interference with internal church governance and ecclesiastical functions simply has no application here, because petitioners are not churches.

2. Extending the church-plan exemption would jeopardize employees' financial security.

ERISA establishes a host of requirements to "protect . . . participants in employee benefit plans and their beneficiaries" (29 U.S.C. § 1001(b)), while exempting churches and associations of churches from funding, vesting, and administrative requirements (see *id.* § 1003(b)(2)). Petitioners argue (at 51) that they have relied on private-letter rulings from the IRS in not complying with ERISA's requirements. But they do not acknowledge that their employees—who were left out of the private-letter process—have relied on ***petitioners'*** promises and the guarantees that ERISA affords. Exempting non-church entities like petitioners would severely burden and substantially injure employees nationwide by vitiating the statutory "protect[ions for] contractually defined benefits" (*Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985)) on which the employees rely for retirement planning and financial security. After all, "[e]mployees of religiously-affiliated hospitals are not immune from the perils of unregulated pension plans." Advocate Pet. App. 17a.

a. *Underfunding.*

ERISA establishes minimum-funding levels for defined-benefit plans to ensure that the plans contain sufficient funds to honor the employers' commitments to employees. See 29 U.S.C. § 1082. Congress imposed these requirements to "mak[e] sure

that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980). Purporting to operate church plans, though they self-evidently are not churches, petitioners do not meet these requirements: Petitioner Dignity Health's plan alone is underfunded by $1.7 ***billion***. Rollins Br. in Opp'n 21.

As Congress intended, employees rely on their employers' pension-benefit promises. See, *e.g.*, Zvi Bodie & Robert C. Merton, *Pension Benefit Guarantees in the United States: A Functional Analysis*, *in The Future of Pensions in the United States* 203–05 (Ray Schmitt ed., 1993). When a pension plan is underfunded, employees' deferred compensation is imperiled and the financial and living arrangements that the employees have made in reliance on this expected income are disrupted.

Employees at ERISA-noncompliant entities like petitioners have already suffered the effects of underfunded plans. The Hospital Center at Orange, New Jersey, ran an ERISA-compliant defined-benefit plan until 1998, when it merged with Cathedral Healthcare System, a religiously affiliated healthcare network. See *Workers Covered by Church Plans Tell Their Stories*, Pension Rights Center, http://tinyurl.com/hospitalcenter. Contending that it now ran an exempt church plan for Hospital Center employees, Cathedral stopped contributing to the Hospital Center pension fund, drained the hospital's accounts, and closed the hospital within a few years. *Id.* The employees—many of whom had accepted lower wages in exchange for a pension plan, and

most of whom had gone to work originally for an employer that acknowledged its obligations under ERISA—found themselves without pensions. *Id.*

The same result befell employees of a religious publishing house in Minnesota. See Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press (Oct. 5, 2013), https://tinyurl.com/unprotectedpensionAP. Because of plan underfunding, the publisher's 500 employees ultimately received less than a third of their promised, expected, and fully vested retirement benefits. *Id.* Likewise, underfunding caused many employees at St. Mary's Hospital in Passaic, New Jersey, to suffer losses of tens of thousands of dollars in retirement funds. See Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic May Lose Their Pensions in Sale*, NorthJersey.com (Apr. 26, 2013), http://tinyurl.com/stmarys hospital.

Ignoring these cases of real and concrete harms to employees, petitioners contend that "there is no evidence of *widespread* failures of church plans" (Br. 61 (emphasis added)), as if that would justify the hospitals' having legal sanction to gamble with their employees' futures. Given petitioners' collective size, the harms here could be far more severe for the legions of dedicated healthcare workers to whom the companies have made promises about benefits that the companies are now declining to keep.

In rejecting a religiously affiliated entity's free-exercise challenge to the minimum-wage and overtime-pay requirements of the Fair Labor Standards Act, this Court observed that, "[l]ike other employees covered by the Act, [a religious foundation's employees] are entitled to its full protection." *Tony & Susan Alamo Found.* v. *Sec'y of Lab.*, 471 U.S. 290, 303–05,

306 (1985). The same should be true here. Just as petitioners cannot evade minimum-wage and overtime-pay laws, they should not be able to exempt themselves from the laws ensuring their employees' financial security when Congress plainly intended otherwise.

b. *No pension insurance.*

Employers who provide ERISA-compliant plans must pay a premium to the Pension Benefit Guaranty Corporation. See 29 U.S.C. § 1307(a). With the revenue raised from these premiums, the Guaranty Corporation insures a portion of covered plans' pension benefits. See *id.* §§ 1305(b)(2)(A), 1322(a), 1322(b)(3). If an employer later turns out to be unable to provide promised benefits, the Guaranty Corporation supplies a safety net, paying part of the benefits on which the employees were relying for their retirement. An uninsured plan, on the other hand, can be devastating.

When St. Mary's Hospital's plan ran out of money, for example, many hospital employees lost tens of thousands of dollars in retirement savings. See Layton, *supra*. The employees could not recover these losses because St. Mary's had treated the plan as though it were an exempt church plan and had not paid premiums to the Guaranty Corporation. See *id.*

Here, too, petitioners have decided that they are free to underfund their plans and to eschew federal pension insurance. See 29 U.S.C. § 1321(b)(3). As a result, if the corporations were to run out of money before satisfying their pension obligations, more than 95,000 participating employees would be left holding the bag—precisely the "'great personal tragedy'"

(*Nachman Corp.*, 446 U.S. at 374 (citation omitted)) that ERISA was enacted to prevent.

c. *Delayed vesting.*

ERISA requires that defined benefits fully vest within five years (or seven years if the benefits partially vest earlier). See 29 U.S.C. § 1053(a)(2)(A)(i). Before ERISA was enacted, employers could, and often did, delay the vesting of benefits even up to the date of actual retirement. Robert L. Clark & Ann A. McDermed, *Pension Wealth and Job Changes: The Effects of Vesting, Portability and Lump-Sum Distributions*, 28 Gerontologist 524, 525 (1988). Without limitations on vesting periods, employers could thus trap their employees, putting them to the unfair choice to stay stuck in a job indefinitely or to walk away from significant retirement savings in order to make a change. See Laurence J. Kotlikoff & David A. Wise, THE WAGE CARROT AND THE PENSION STICK: RETIREMENT BENEFITS AND LABOR FORCE PARTICIPATION 1–2 (1989). Congress designed ERISA to ameliorate these oppressive conditions.

If petitioners were exempt from ERISA's requirements, they could delay the vesting of their employees' pension benefits for years. Those who left the companies before retirement age could be entirely deprived of their retirement savings. Employees would thus suffer the "lock in"—and its accompanying economic and professional consequences—that ERISA was designed to prevent. See *id.*

d. *No disclosures.*

Under ERISA, employers must provide plan beneficiaries with a range of information, including summary plan descriptions, notices of the plan's failure to meet minimum funding standards, and yearly

funding notices. See 29 U.S.C. § 1021. The funding notices provide critical information about the financial health and reliability of the plan. They inform beneficiaries about: whether the plan is fully funded—and if not, what percentage is funded; the value of plan assets and liabilities; the number of active plan participants; the number of participants receiving benefits; the number entitled to future benefits; the asset allocation for plan investments; plan amendments; and a description of the benefits insured by the Guaranty Corporation. See 29 U.S.C. § 1021(f).

This information enables employees to make intelligent decisions about retirement. If they know that their pension is stable, they may reasonably rely on it as they plan for retirement. Conversely, if they learn that their pension benefits are insecure, they may increase their retirement savings (or change jobs) to ensure that they can retire with sufficient assets even if their employer reneges on its promises.

If exempted from ERISA's requirements, petitioners would not need to notify their employees about the financial health of their pension plans. And there is particular cause for concern that petitioners will not do so if or when pension funds are in jeopardy. The corporations' employees do not receive summary plan descriptions, summary annual reports, pension-benefit statements, or minimum-funding notices. See, *e.g.*, J.A. 282–85, 448–51, 797–800. As a result, employees lack notice of whether their pension plans are underfunded, uninsured, and unlikely to deliver the benefits that the employees were promised and rely on.

Again, the experiences at other hospitals confirm the risks to employees from insufficient disclosure by entities purporting to run exempt church plans.

One employee at The Hospital Center at Orange agreed to receive reduced monthly benefits in exchange for naming his wife as the plan beneficiary, on the understanding that this selection would extend the period of defined-benefit payouts. See *Workers Covered by Church Plans*, *supra*. Had the hospital disclosed that the benefits might expire at any time (which they did when the hospital went broke), the employee would have selected a different option and received higher payments all along. See *id.* In 2013, the Guaranty Corporation ultimately chose to insure the pension plan. See *In Reversal, PBGC Covers Pension of Hospital Center at Orange*, Pension Benefit Guaranty Corporation (May 10, 2013), http://tinyurl.com/pbgcrelease. But during the preceding ten years, when the plan was uninsured and underfunded (*id.*), the employee had to come out of retirement to provide for his family (see *Workers Covered by Church Plans*, *supra*).

Similarly, the employees of St. Mary's Hospital knew that the hospital faced financial difficulties but believed that their pensions were guaranteed. See Layton, *supra*. Because St. Mary's viewed itself as operating a church plan, however, it did not notify the employees that the plan was underfunded by as much as $25 million and was not federally insured. *Id.* The employees were blindsided when they discovered that their promised pension benefits had disappeared. See *id.*

* * *

Employees at religiously affiliated hospitals, like employees at their nonreligious counterparts, depend

on promised benefits. Judicial expansion of the church-plan exemption would put these employees' financial security at risk. The Seventh Circuit summarized the lack of accountability when nonchurch employers like petitioners have considered themselves exempt from ERISA, left pension plans underfunded and uninsured, and later encountered financial troubles: "[B]ecause no church had established those hospital[] plans, there was no church to accept responsibility for the fate of the participants' retirement benefits." Advocate Pet. App. 17a–18a. The employees were simply out of luck.[4] These risks may be acceptable to those who choose to work at a house of worship, knowing that their employer is exempt from ERISA's legal requirements but perhaps trusting it to do right by them as part of its mission. Cf. *id.* at 17a–18a. But hospital employees of varying faiths who perform secular jobs do not knowingly and voluntarily assume those risks. The Establishment Clause does not allow the hospitals to use the church-plan exemption to foist those risks onto their employees.

3. *Large numbers of employees would be harmed if petitioners succeeded here.*

Judicially expanding the church-plan exemption to cover religiously affiliated entities like petitioners would affect an enormous number of employees,

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[4] To the extent that the employees may have had potential state-law claims, those claims would have been subject to the patchwork of confusing, inadequate, and under-developed legal standards that led Congress to enact ERISA and broadly preempt state law in the first place. See, *e.g.*, 29 U.S.C. § 1001(a); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990) (Congress wanted to provide employees and employers alike with "a uniform body of benefits law").

many of whom do not share their employers' religious beliefs—and most of whom perform purely secular jobs. Collectively, petitioners have more than 95,000 employees (Resp. Br. 9–10); they do not require those employees to be religious, let alone to share the entities' religious beliefs or practices; and the companies' management teams consist mostly of laity. See, *e.g.*, *Board of Directors*, Dignity Health, https://tinyurl.com/DignityHBd (last visited Feb. 22, 2017); *Board of Trustees*, St. Peter's Hospital, http://www.sphcs.org/BoardofTrustees (last visited Feb. 22, 2017); *Board of Directors*, Advocate Health Care, https://tinyurl.com/AdvHCBdD (last visited Feb. 22, 2017). That should come as no surprise: Petitioners are hospitals, not houses of worship. So what presumably matters to them is that they hire qualified healthcare workers and administrators, and that they run themselves as medical facilities.

Religiously affiliated hospital networks like petitioners now make up a substantial portion of the nation's healthcare system. In 2012, seven of the ten largest nonprofit healthcare systems in the United States were religiously affiliated. Molly Gamble, *25 Largest Non-Profit Hospital Systems*, Becker's Hosp. Rev. (July 24, 2012), http://tinyurl.com/nonprofit hospitals. Together, these entities owned 77% of the acute-care hospitals within those ten largest nonprofit healthcare systems. *Id.* And Catholic hospitals alone host more than one-sixth of the nation's hospital beds. See American Civil Liberties Union, *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threats To Women's Health and Lives* 22 (May 2016), http://tinyurl .com/ACLUSpeakOut. In sixteen states, that figure climbs to at least one-fourth of all hospital beds. *Id.* at 26.

In many instances, religiously affiliated hospitals are the only hospitals in their communities. The Center for Medicare and Medicaid Services classifies certain hospitals as "sole community hospitals." 42 C.F.R. § 412.92. In 1998, forty-eight religious hospitals—be they Adventist, Baptist, Catholic, or Methodist—were the sole provider in their communities. See MergerWatch, *No Strings Attached: Public Funding of Religiously-Sponsored Hospitals in the United States* 90 (2002), https://tinyurl.com/zygxped.

That number is on the rise. Religious hospital networks like petitioners have been aggressively merging with each other and swallowing up nonreligious public hospitals. See MergerWatch, *When Hospitals Merge: Updating State Oversight to Protect Access to Care* 4–5 (2016), https://tinyurl.com/Hosp Merge16; see also American Civil Liberties Union & MergerWatch, *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Reproductive Health Care* 7–9 (Dec. 2013), http://tinyurl.com /MisOfMed. Because of these mergers, many healthcare professionals and support personnel who did not seek out or accept a job at a religiously affiliated employer are now working for one; and if they wish to remain in the healthcare occupation for which they are trained, they may have few or no secular alternatives. They should not be deprived of their hard-earned retirement savings as well.

The number of employees whose fortunes turn on the outcome of this case thus goes well beyond petitioners' 95,000. For if the Court were to rewrite ERISA as petitioners ask, that number could swell by at least 700,000 employees at other religiously affiliated hospitals nationwide whose plans currently comply with ERISA but could be converted to church

plans. See Resp. Br. 53a–66a. And that is not to mention the countless employees at religiously affiliated nonhospital entities, such as universities, who might suffer the same fate.

What is more, ERISA covers most types of employee benefits; so does the church-plan exemption. Hence, if the exemption were to be extended to religiously affiliated nonchurch employers, countless entities across the country would be free to deny ERISA's many critical protections for other benefits, such as 401(k) disclosure requirements (see 29 U.S.C. § 1021(a)), COBRA coverage-extension (29 U.S.C. § 1161), and prompt-claims-administration provisions for health plans (see 29 U.S.C. § 1133). The resulting harms to employees would be severe, widespread, and entirely at odds with what Congress intended.

To add insult to injury, petitioners contend (at 45) that enforcing ERISA as Congress mandated would actually hurt employees, because it is expensive to comply with ERISA. According to petitioners, they and other religiously affiliated businesses should be able to provide pension plans to their employees without having to comply with the requirements that make those plans secure and reliable, because offering pension plans is optional in the first place, and they could cease to offer any pension benefits at all rather than take on the costs of compliance.

If the fact that an employer need not offer pension plans were sufficient to excuse noncompliance with ERISA, that would be true in all cases of ERISA violations, not just improper invocation of the church-plan exemption. In all events, there are hundreds of hospitals across the country, including some run by petitioners themselves, that choose to offer

ERISA-compliant plans despite any compliance costs—presumably because they see a benefit in doing so. See Resp. Br. 38a–52a. When a hospital or other business decides to provide benefits to make itself more attractive to potential employees or to reduce the amount that it must pay in regular wages, it takes on certain legal obligations. If it chooses not to offer a pension plan, that decision, though permissible, comes with consequences: The business may have more difficulty attracting and retaining the most qualified and desirable employees, who may demand higher wages or go elsewhere for better total compensation. The possibility that, on those terms, an employer could elect not to offer a pension plan is no excuse for evading the legal duties that merely hold the employer to the promises that it made when it hired the employees.

* * *

Congress declared that when employees are promised pensions and rely on them in planning for their futures, they should be protected against inept or unscrupulous handling of their deferred compensation. It would be an odd—and unconstitutional—distortion of a measure intended to promote employee retirement income security to impose here such sweeping harms on the financial security of employees across the country.

II. The First Amendment Does Not Require The Government To Treat Religiously Affiliated Institutions Like Houses of Worship.

Petitioners argue that religiously affiliated institutions must be afforded the status of houses of worship because, they say, it is either not possible or not permissible under the Establishment Clause to distinguish between churches and nonchurches. But

Congress, state legislatures, executive agencies, and courts do just that all the time, without running afoul of the First Amendment's proscriptions. If petitioners' arguments were accepted, it would no longer be possible to afford special solicitude to houses of worship without extending the whole range of existing protections and accommodations to every organization, every entity, and perhaps every individual who asserts a religious affiliation or connection. That would deter Congress and administrative agencies from ever accommodating houses of worship.

1. Lower courts have had no difficulty determining whether an organization is or isn't a house of worship. As the Eighth Circuit put it, "[t]he means by which an avowedly religious purpose is accomplished separates a 'church' from other forms of religious enterprise." *Lutheran Soc. Serv. of Minn.* v. *United States*, 758 F.2d 1283, 1287 (8th Cir. 1985) (citation omitted).

Thus, in *Living Faith, Inc.* v. *Commissioner*, 950 F.2d 365 (7th Cir. 1991), the Seventh Circuit rejected the argument that a religious restaurant must be treated as a house of worship for tax purposes, explaining that the IRS permissibly examined conduct rather than motivations, "cast no aspersions on the sincerely held beliefs of [the restaurant]," and denied the exemption "without entering into any subjective inquiry with respect to religious truth." *Id.* at 376 (citation omitted). Similarly, in *Spiritual Outreach Society* v. *Commissioner*, 927 F.2d 335 (8th Cir. 1991), the Eighth Circuit upheld the IRS's determination that a gospel-music organization was not a church, again focusing on objective factors, such as the "[non]existence of an established congregation served by an organized ministry, the [non]provision of regu-

lar religious services and religious education for the young, and the [non]dissemination of a doctrinal code." *Id.* at 339 (citation omitted). Other examples are legion.[5]

2. Nor have there been either entanglement problems or practical difficulties when Congress or government agencies have sought to specify what is or isn't a house of worship.

Section 501(c)(3) of the Internal Revenue Code, for example, distinguishes between houses of worship and other nonprofits, religiously affiliated or otherwise. See 26 U.S.C. § 501(c)(3); see also *Spiritual Outreach*, 927 F.2d at 339 (organization operated exclusively for religious purposes did not meet secular statutory criteria for church status). Accordingly, the IRS routinely looks at secular criteria—including the composition of an organization's membership, whether the organization has regular congregations, and whether it holds regular religious services—to decide whether an entity is a church. See *Found. of Human Understanding* v. *United States*, 614 F.3d

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[5] See, *e.g.*, *Lutheran Soc. Serv.*, 758 F.2d at 1286–87 (religious charity not a church based on its "primary activities"); *Church of the Visible Intelligence that Governs the Universe* v. *United States*, 4 Cl. Ct. 55, 64–65 (1983) (plaintiff "not a church" but a tax-exempt "religious foundation"); *Williams Home, Inc.* v. *United States*, 540 F. Supp. 310, 317–18 (W.D. Va. 1982) (religious organization not a church for tax purposes); *Basic Unit Ministry of Alma Karl Schurig* v. *United States*, 511 F. Supp. 166, 167–69 (D.D.C. 1981) (organization allegedly engaged in providing religious education not entitled to be treated as a church because its earnings went to private individual), aff'd, 670 F.2d 1210 (D.C. Cir. 1982); *Am. Guidance Found., Inc.* v. *United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (religious organization not a church for tax purposes).

1383, 1387 n.2 (Fed. Cir. 2010) (describing IRS's test for deciding which organizations are churches).

Similarly, what is determinative under ERISA's church-plan exemption is an entity's actions, not its beliefs. And whatever may drive petitioners' decisions to operate healthcare facilities, their institutional missions are accomplished through medical procedures performed primarily by lay doctors and other healthcare professionals who are trained in secular schools and licensed by state administrative agencies. As noted in Section I.A.2, *supra*, those functions, and all aspects of the financial arrangements that touch on them, are already subject to governmental regulation, oversight, and enforcement—all without interfering with the ecclesiastical functions of a denomination or house of worship.

3. If Congress, federal and state regulators, and courts were forbidden to distinguish houses of worship from other religiously affiliated entities, a wide array of statutes and regulations would be invalid.

Many provisions in the tax code offer exemptions to houses of worship but not to all religious or church-affiliated entities. For example, although tax-exempt charitable organizations do not file traditional tax returns, they must file an annual Form 990 (Return of Organization Exempt From Income Tax) to disclose certain information about how they are funded, what assets they own, and how they expend those assets, so that members of the public who contribute to them will know how their money is being used. 26 U.S.C. § 6033; IRS, *Form 990*, https://tinyurl.com/IRSFrm990. Churches have no such disclosure requirements. See 26 U.S.C. § 6033(a)(3)(A)(i). Indeed, unlike other charitable organizations, churches are exempt from having to reg-

ister with the IRS as nonprofits; they get that status automatically and without even asking. See 26 U.S.C. § 508(c)(1)(A); see also IRS Pub. 1828, at 3 (noting that religious organizations, but not churches, must apply to IRS for tax-exempt status unless their annual gross receipts do not normally exceed $5,000). The Lobbying Disclosure Act does not apply to churches. 2 U.S.C. § 1602(8)(B)(xviii). And churches have enhanced protections against audits. 26 U.S.C. § 7611.[6] If petitioners' arguments here were correct, then all these exemptions and exceptions must also extend to every religiously affiliated entity.

4. Petitioners (at Br. 58–59) and their *amici* contend, however, that applying the church-plan exemption as written would violate the Establishment Clause's rule against denominational preferences. Specifically, they argue that *Larson* v. *Valente*, 456 U.S. 228 (1982), requires judicially extending the church-plan exemption to religiously affiliated hospitals, because otherwise the exemption would supposedly disfavor congregational denominations (those without a central power structure) and favor hierarchical ones that are more likely to have a central

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[6] See also 26 U.S.C. § 170(b)(1)(A)(i) (individuals may deduct up to 50% of "contribution base" only as to certain organizations, the first of which is "a church or a convention or association of churches"); 26 U.S.C. § 514(b)(3)(E) (calculation of "unrelated business taxable income" includes a "special rule for churches"); 26 U.S.C. § 3309(b)(1) (churches and certain other religious organizations, but not religious organizations generally, have special status under the Federal Unemployment Tax Act); 26 U.S.C. § 6043(b)(1) (churches and their integrated auxiliaries, but not religious organizations generally, are exempt from filing certain returns upon dissolution).

church administration to establish a plan. That argument is incorrect both legally and factually.

Larson involved a statute that formally established different legal requirements for religious denominations depending on how they received contributions. See 456 U.S. at 253. The Court held that strict scrutiny applies to laws that "discriminate among religions." *Id.* at 252. Thus, the statute in *Larson* was invalid because it "was drafted with the explicit intention of including particular religious denominations and excluding others." *Id.* at 254.

In drafting ERISA, by contrast, Congress did not set out to treat some houses of worship or denominations differently from others—and it has not done so. All are subject to exactly the same requirements for establishing a church plan. Under *Larson*, the "burdens of compliance" with a law are not "intrinsically impermissible if they [are] imposed evenhandedly" (456 U.S. at 253), thus disposing of petitioners' argument here.

To the extent that petitioners may be complaining that following those evenhanded rules for establishing a church plan may seem more onerous to smaller denominations or to nondenominational houses of worship, Congress has specifically addressed even that subconstitutional criticism: Congress took great pains to minimize the burdens of compliance (as well as to distribute the burdens equally) by amending ERISA to allow for the less-expensive and less-complicated forms of plan administration that tend to be favored by smaller, independent houses of worship. See 29 U.S.C. § 1002(33)(A) (allowing associations of churches to establish and administer plans); *id.* § 1002(33)(C)(i) (allowing principal-purpose organizations, such as

pension boards, to maintain church plans). To contend that ERISA favors hierarchical religions over nonheirarchical ones is thus incorrect. And to argue that the church-plan exemption must be extended to massive hospital networks to ensure that congregational houses of worship are treated the same as hierarchical ones is fanciful.

5. Petitioners offer no limiting principle to prevent their proffered extension of the church-plan exemption from swallowing the rule that employers who offer pension plans must comply with ERISA's mandates. Not only would petitioners' approach necessarily extend the church-plan exemption beyond hospitals to all religiously affiliated nonprofits of whatever sort, but it would create substantial financial incentives for secular institutions to assert a religious connection, real or imagined, to claim the exemption. Those financial incentives, and the conduct to which they would give rise, serve neither the purpose of the church-plan exemption nor the First Amendment's core prohibition against the government's penalizing or rewarding religious belief and practice.

What is more, petitioners provide no rationale that would distinguish religious nonprofits from secular ones (or, for that matter, from for-profit businesses that espouse religious views or interests). Arguments similar to petitioners' are already being made in bids to extend other church exemptions. And indeed, at least one court has reached the startling conclusion that the Establishment Clause requires extending to avowedly secular nonprofits the full house-of-worship exemption from the Affordable Care Act's contraceptive-coverage requirement—a bizarre distortion of the First Amendment. See

March for Life v. *Burwell*, 128 F. Supp. 3d 116, 120 (D.D.C. 2015), *appeal held in abeyance*, No. 15-5301 (D.C. Cir. June 17, 2016).[7]

Judicially expanding the church-plan exemption as petitioners ask would thus go well beyond Congress's objective to minimize the danger "that the examinations of [church] books and records" would result in "unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 93-383, at 81.

By rejecting any line-drawing between houses of worship and other entities, petitioners' desired ruling would provide a strong deterrent to the government's ever affording accommodations for houses of worship, and an equally strong incentive to abolish accommodations that currently exist. For Congress would know that any statutory exemption, exception, or accommodation for houses of worship would have to be made available to all entities that assert any religious connection, no matter how tenuous, and would likely be claimed also by entities with no religious connection whatever. See generally Brief of Baptist Joint Committee for Religious Liberty as *Amicus Curiae* in Support of Respondents, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 692850. Whatever respect for houses of worship an exemption might be intended to serve would thus be severely compromised.

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[7] Another court has more cogently reached the opposite conclusion. See *Real Alts., Inc.* v. *Burwell*, 150 F. Supp. 3d 419, 440 (M.D. Pa. 2015), *appeal held in abeyance*, No. 16-1275 (3d. Cir. Nov. 30, 2016).

* * *

Congress enacted ERISA to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.*, 446 U.S. at 375. To respect the ecclesiastical authority and independence of churches, Congress created a carefully defined, carefully circumscribed church-plan exemption. To expand that exemption as petitioners ask would license hospitals, colleges and universities, counseling programs, professional associations, and countless other entities to deny employees the benefits that they were promised, based on nothing more than a bare nod to religion. Neither the text or legislative history of ERISA nor the strict requirements of the Establishment Clause mandate or even allow that result.

CONCLUSION

The uniform judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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